Klasse Department Store Sdn Bhd v Central Development Sdn Bhd

HIGH COURT (BANDAR SERI BEGAWAN) – SUIT NO 200 OF 1988
ROBERTS CJ
4 AUGUST 1988

Civil Procedure – Injunction – Whether available to party in default of rental payments – Brunei High Court (Civil Procedure) Rules, O 47 r 2

The plaintiffs sought ex parte an injunction under O 47 r 2 of the Brunei High Court (Civil Procedure) Rules to restrain the defendants and their servants or agents from entering the Klasse Department Store for non-payment of rent. The principal contention of the plaintiffs was that the defendants were in breach of, inter alia, the obligation in the underlease to maintain airconditioning. The application was adjourned by the chief registrar for inter partes hearing and which subsequently came before the Chief Justice.

Held, allowing the application:

(1) The plaintiffs have established that they have a good arguable case and there is a serious question to be tried between the parties.

(2) As for the balance of convenience, damages would not be a sufficient remedy. If, as they fear as a result of the letters issued by the defendants, the plaintiffs failed to pay rent and are evicted, their business will suffer to a degree which cannot be properly compensated by damages. These would in any event be very difficult to assess.

Cases referred to

1 *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 (folld)
2 *British Anzani (Felixstowe) Ltd* v *International Marine Management (UK) Ltd* [1980] QB 137 (folld)

Legislation referred to

Brunei High Court (Civil Procedure) Rules O 47 rr 1, 2, 3, 4
Supreme Court Act (Cap 5)

David Young for the plaintiffs.
Ferida Abang Zen for the defendants.

Cur Adv Vult

Roberts CJ: Mr David Young, on behalf of the plaintiffs, sought ex parte an injunction on 9 July, under O 47 r 2, to restrain the defendants and their servants or agents from entering the Klasse Department Store for non-payment of rent.

The application was adjourned by the chief registrar to 26 July for an inter partes hearing. With the consent of Ferida Abang Zen, for the defendants, and of Mr Young, for the plaintiffs, the application was adjourned on that date to 4 August 1988, before me for further argument.

The existing order for an injunction was to continue until the adjourned hearing and there was no order as to costs.

Power of court

Before deciding whether I should issue an injunction against the defendants, it was necessary for me to decide whether such power exists in Brunei.

There is, of course, no doubt that such a power exists in England, whether by virtue of s 37 of the Supreme Court Act 1981 or O 29 of the English Rules of the Supreme Court. However, I had to look at the Brunei rules to see how far they allowed me to make the order sought, if I were to decide that it was proper to take such a course.

It was agreed by both parties, as I understand it, that O 47 r 1 did not apply and that O 47 r 3 and r 4 deal only with the preservation of property which is the subject of the suit and is of a perishable nature.

Order 47 r 2, however, is in unlimited terms and does not require, as other rules under O 47 do, that the plaintiff shall first satisfy the court that his claim falls into one of the limited categories specified therein, with one important qualification.

This requires that the court shall, before exercising those powers, first be satisfied that there are issues between the parties which ought to be the subject of a speedy trial. Once the court is convinced of this, it may not only order a speedy trial, it may in addition make such other orders as 'justice may require'.

The Order deals with the granting of injunctions. Although it does not in terms mention them in relation to O 47, I have no doubt that one of the ways in which 'justice may require' that an order under it shall be carried into effect is by means of an injunction.

Coupled with this power is the ability of a court to attach such conditions as it thinks just to the making of an order under O 47. This will include payment into court, or into a joint account, of any sum which the court may consider proper, a suitable order as to costs and the exchange of pleadings.

Parties' case

I have been taken carefully through the various affidavits sworn by Mr McGuckin, Managing Director of Klasse, and Mr Huang Chao Jen, a director of the defendants, and the writ of summons and statement of claim of the plaintiffs.

It is clear that there has been a dispute for some years between the parties about the structural condition of the premises and the maintenance of lifts and air conditioning equipment.

The plaintiffs allege that the defendants have assumed responsibility for air conditioning and that the defendants, who dispute this, agreed to a reduction in rent of $4,500 a month, since June 1984.

The main claim by the defendants is for $81,408 a month, the agreed rental for the premises. This is now three months in arrears, ie the rent for June, July and August (payable in advance) has not been paid. The principal contention of the plaintiffs is that the defendants have not fulfilled their obligations under the underlease.

About March 1987, the plaintiffs were informed that the structural condition of the premises was such that they ought not to be used as a supermarket. Both parties then agreed to Dr Lau, from Singapore, a consultant in these matters, examining the premises, which was carried out by his firm from February to May 1987. Dr Lau reported in June 1987.

Dr Lau's opinion was that the premises could only be used as a supermarket on a reduced scale and that a measure of piling was essential if the building was to be made structurally sound. No steps appear to have been taken by either party as a result of his report and rent (except for the $4,500 a month which is the subject of a dispute between them) was paid by Klasse to the defendants up to and including that due for May 1988.

In spite of the fact that such payment was made the defendants had, on more than one occasion, referred to their right to enter the premises under cl 4(ii) of the agreement entered between the parties in 1979 in the event of non-payment of the rent due from the plaintiffs under that agreement.

The plaintiffs, by this application, have sought to preserve their position against the defendants, alleging that the latter could at any time enter the premises, thus making it impossible for Klasse to continue their business. This, the plaintiffs say, is in spite of the clear failure of the defendants to fulfil their covenant in the underlease to maintain the structure of the premises and to keep the lifts and air conditioning in good repair.

The defendants argued, on the other hand, that they were under no obligation under the agreement to maintain the fabric of the building, so far as the defendants were concerned, even if there was a liability resting on the defendants by their lease with the head landlord, Abdul Razak Holdings, to keep the structure of the premises in good repair. Furthermore, the defendants argued, there was a new roof on the second floor, because the plaintiffs had built on a third floor after direct negotiation with the head landlord.

Is there a genuine issue

Before exercising any of the powers which exist under O 47 of the Brunei rules, I must first be satisfied that the conditions set out in the *Cyanamid* case[1] governing the grant of an injunction have been satisfied – see *American Cyanamid Co* v *Ethicon Ltd*:[1]

(1) The plaintiff, before an injunction may properly be granted, must establish that he has a good arguable claim to the right which he wishes to protect.

(2) It is sufficient if the plaintiff shows that there is a serious question to be tried.

(3) If the plaintiff satisfies these tests, the court will exercise its discretion on the balance of convenience.

I am satisfied, from a reading of the affidavits, that the plaintiffs have established that they have a good arguable case, especially taking into account the report of Dr Lau, the affidavit of Mr McGuckin and the terms of the underlease signed by both parties.

Similarly, I have no doubt that there is a serious question to be tried between the parties.

As to the balance of convenience, I do not consider that damages would be a sufficient remedy. If, as they fear as a result of the letters issued by the defendants, the plaintiffs fail to pay rent and are evicted, their business will suffer to a degree which cannot, in my view, be properly compensated for by damages. These would, in any event, be very difficult to assess.

In the result, I consider that this is a proper case for the issue of an injunction, provided that such a remedy is available where the plaintiffs seek to withhold rent, against damages which it claims against the defendants but are not yet quantified.

There was some doubt before *British Anzani (Felixstowe) Ltd* v *International Marine Management (UK) Ltd*[2] as to whether a tenant is entitled to withhold his rent, if his claim includes breaches of express or implied obligations in an underlease, as the plaintiffs allege here. It is now accepted that this is a proper deduction, so long as it is a genuine one, as I am sure that it is, having seen the underlease.

I therefore decide that the following order could be made:

(1) there should be a speedy trial of the action under O 47 r 2 as soon as possible after the November session;

(2) there should be payment into a joint account, in the names of the solicitors for both parties, of rent of $76,908 a month, for June, July and August 1988 and each month thereafter until further order by the court or a judge;

(3) the lease granted by the defendants to the plaintiffs should not be forfeited for non-payment of rent by the plaintiffs;

(4) a defence be delivered by the end of August 1988;

(5) a reply be delivered within 14 days of delivery of a defence;

(6) there be liberty to either party to apply to a judge or the court;

(7) the plaintiffs to have costs of this application before the chief registrar and here. Costs to be taxed if not agreed.

Order accordingly.

Solicitors: *Bonds*; *DF Abang Zen.*

Reported by *Al-Mansor Adabi*

Klasse Department Store Sdn Bhd v Central Development Sdn Bhd (No 2)

HIGH COURT (BANDAR SERI BEGAWAN) – SUIT NO 200 OF 1988
ROBERTS CJ
4 AND 6 AUGUST 1988

Civil Procedure – Mareva injunction – Whether can be granted in Brunei – Stare decisis

The plaintiffs sought an order to restrain the defendants and their servants or agents from removing their assets from Brunei, subject to various acts which they were permitted to do within the jurisdiction. The plaintiffs appeared ex parte before the chief registrar who refused the application. However, he continued the injunction sought which was a Mareva injunction until the matter could be argued before the Chief Justice by way of appeal. The chief registrar was satisfied that he was bound by Jones J in *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd*[1] which was upheld by the Court of Appeal. The chief registrar therefore dismissed the application for a Mareva injunction with costs to the defendants. The plaintiffs appealed.

Held, dismissing the appeal:

(1) It was not open to the court to find that there was jurisdiction in Brunei to issue a Mareva injunction.

(2) Even if there was such jurisdiction, there were no merits in the application of the plaintiffs in the instant case.

[*Editorial Note*: In this case the learned Chief Justice said that although it was not open to him to find that there was jurisdiction in Brunei to issue a Mareva injunction, 'this, in a commercial community, where assets can be readily moved into and out of Brunei, is most regrettable'. The learned Chief Justice was in favour of using the Mareva injunction which had proved to be a potent weapon in other parts of the world. He gave eight summarized arguments to support the existence of such power in the courts in Brunei and expressed the hope that at some time in the future, the Court of Appeal may decide to exercise the limited powers conferred by *Young* v *Bristol Aeroplane Company Ltd*[9] in holding that a Mareva injunction was obtainable in Brunei.]

Cases referred to

1 *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd* [1983] 2 MLJ 420 (folld)
2 *Beddow* v *Beddow* [1878] 9 ChD 89 (refd)
3 *Day* v *Brownrigg* (1878-79) 10 ChD 294 (refd)
4 *Gouriet* v *Union of Post Office Workers* [1978] AC 435 (HL) (refd)
5 *The North London Railway Co* v *The Great Northern Railway Co* (1882-1883) 11 QBD 30 (CA) (refd)
6 *Lister & Co* v *Stubbs* (1890) 45 ChD 1 (refd)
7 *Nippon Yusen Kaisha* v *Karageorgis* [1975] 3 All ER 282 (refd)
8 *The Mareva* [1980] 1 All ER 213 (refd)
9 *Young* v *Bristol Aeroplane Company Ltd* [1944] KB 718 (refd)
10 *Prince Abdul Rahman* v *Abu-Taha* [1980] 3 All ER 409 (folld)

Legislation referred to

Brunei High Court (Civil Procedure) Rules O 47
Supreme Court Act (Cap 5)

David Young for the plaintiffs.
Ferida Abang Zen for the defendants.

Roberts CJ: By a summons dated 20 July, the plaintiffs sought an order restraining the defendants, their servants or agents from removing their assets from Brunei, subject to various acts which they were permitted to do within the jurisdiction.

Mr David Young, for the plaintiffs, appeared ex parte on 20 July 1988 before the chief registrar, who refused the application. However, he continued the injunction sought (which was a Mareva injunction) until the matter could be argued before me by way of appeal.

The matter was heard further on 26 July by the chief registrar, Miss Ferida Abang Zen appearing for the defendants and Mr David Young for the plaintiffs.

After hearing argument, the chief registrar dismissed the application with costs, being satisfied that he was bound by the decision of Jones J in *Mohamed Hassan* v *Sherwood Bears (S) Pte Ltd*[1] which was upheld by the Court of Appeal in Civil Appeal No 5 of 1982. On the basis of these decisions, I had felt it necessary to dismiss an application for a Mareva injunction also in Civil Suit No 250 of 1983.

The chief registrar therefore dismissed the application for a Mareva injunction with costs to the defendants. The plaintiffs appeal today against that decision.

Decision of the Court of Appeal

I normally follow, as a matter of consistency, a decision of another judge of the High Court of Brunei. I pay much respect to decisions of the High Court or Federal Court of Malaysia, and of the Supreme Court of Singapore, since all are often concerned with a statute which is in the same terms as Brunei legislation. In none of these cases, however, am I obliged to follow the other decision.

This, however, does not apply to decisions of the Brunei Court of Appeal or of the Privy Council (and generally of the House of Lords, subject to s 2 of the Application of Laws Act, where it provides that the application of English law shall be subject to local circumstances). In such instances, I have no choice and am obliged to follow those decisions.